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No. 07-266

IN THE

Supreme Court of the United States

PERFECT 10, INC., a California corporation,

Petitioner,

v.

CCBILL LLC, CWIE LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under 47 U.S.C. § 230(c)(1), no interactive computer services provider or user may be held liable for content provided by another. Section 230(e)(2) provides that this immunity shall not "limit or expand any law pertaining to intellectual property." The Ninth Circuit court of appeals held that Section 230(e)(2) limits the immunity provided by Section 230(c)(1) only if a federal intellectual property claim is asserted. Thus, the Ninth Circuit held that Section 230(e)(2) did not apply to the state trademark and right of publicity claims of Petitioner Perfect 10, Inc. ("Perfect 10"), which were therefore barred by Section 230(c)(1).

Should the Supreme Court review this decision where there is no conflict with the decision of any other circuit court of appeals?

Should the Supreme Court review this decision where no important federal question requiring resolution by this Court or conflict with decisions of this Court has been presented?

Should the Supreme Court review this decision where the case is ongoing, such that it could be reviewed later if appropriate?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, CCBill, LLC ("CCBill") and CWIE, LLC ("CWIE") disclose that they are each owned by CWIE Holding Company, Inc., a privately held company. No publicly held corporation owns 10% or more of the membership interests in either CCBill or CWIE.

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OPPOSITION TO PETITION FOR CERTIORARI

Respondents CCBill, LLC ("CCBill") and CWIE, LLC ("CWIE") hereby respectfully oppose the petition filed by Perfect 10, Inc. ("Perfect 10") for a writ of certiorari to review the decision in this case of the United States Court of Appeals for the Ninth Circuit. CCBill and CWIE also hereby oppose and respond to the briefs of Amicus Curiae Screen Actors Guild, Inc. ("SAG") and CMG Worldwide, Inc. ("CMG").

OPINIONS BELOW

The initial opinion of the court of appeals is reported at 481 F.3d 751 (9th Cir. 2007). The amended opinion of the court of appeals is reported at 488 F.3d 1102 (9th Cir. 2007). The opinion of the district court is reported at 340 F. Supp. 2d 1077 (C.D. Cal. 2004).

COUNTERSTATEMENT OF THE CASE

A. The Facts of the Case.

Petitioner Perfect 10 publishes an adult entertainment magazine and the website perfect10.com. Perfect 10 holds registered copyrights for images of models appearing in its magazine and on its website, as well as several trade or service marks. (Petitioner's Appendix ["App."] 34a-35a.) Many of the models appearing in Perfect 10's images have signed releases assigning their rights of publicity to Perfect 10. (App. 3a.)

Perfect 10 claims that its images have been copied and posted by websites whose proprietors are not parties to this litigation. (App. 2a.) Rather than suing these alleged direct infringers, Perfect 10 has sued numerous Internet service providers whose operations are quite distant from the alleged infringing activity. In addition to this lawsuit, Perfect 10 has targeted and filed similar lawsuits against a number of other payment processors, search engines, and credit card associations, including Visa International Service Association, MasterCard International Inc., Google, Inc., and Amazon.com, Inc., for their roles in providing Internet and payment processing services. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 2004 WL 3217732 (C.D. Cal. Dec. 3, 2004), *aff'd*, 494 F.3d 788 (9th Cir. 2007); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006), *aff'd in part, rev'd in part sub nom. Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007). As here, Perfect 10 has theorized that liability should be imposed on these defendant service providers because their services allow webmasters with infringing content to flourish. The courts in these cases have largely rejected Perfect 10's theories.

Respondent CCBill provides "a fully automated Internet service that enables customers to use credit cards or checks to pay for subscriptions or memberships to e-commerce venues created and offered by CCBill's clients." (App. 4a, 39a-40a.) CCBill does not produce, design, supervise or edit the content of its clients' websites. (App. 39a.) As Perfect 10 has consistently acknowledged, CCBill does not itself transmit any infringing material. (App. 20a, 82a.)

Respondent CWIE is a provider of Internet access, website hosting, and other Internet-related services. (App. 3a-4a, 37a-38a.) CWIE provides its clients, and their customers and users, "the means to acquire and disseminate public, private, commercial, and non-commercial information," by supplying what the Internet industry refers to as "ping, power, and pipe"—ensuring that the server is on and connecting the client's server or website to the Internet backbone via a data center connection. (*Id.*) CWIE does not produce, design, supervise or edit the content of its clients' websites. (App. 38a.)

Contrary to Perfect 10's unwarranted assertions, both the district court and the court of appeals found, save for narrow factual issues to be determined upon remand, that Respondents had no actual or constructive knowledge of infringement, and that their services were not a draw for infringing activity. (App. 9a-18a, 23a-25a, 76a-80a, 83a-88a.)

B. The Proceedings Below.

Perfect 10 sued CCBill, CWIE, and others in district court for copyright infringement, trademark infringement, and state law claims, including rights of publicity and unfair competition. Perfect 10 claimed that CCBill, CWIE, and others were secondarily liable for the actions of direct infringers.

The district court bifurcated this action into two phases, the first relating solely to defenses under the Communications Decency Act ("CDA"), 47 U.S.C. § 230, and the Digital Millennium Copyright Act ("DMCA"),

17 U.S.C. § 512. After the close of discovery on this first phase, the defendants filed motions for partial summary judgment on their CDA and DMCA defenses.

CCBill and CWIE argued that they were entitled to summary judgment against Perfect 10's state law claims because, as interactive computer service users or providers who were not the providers of the challenged content, they were entitled to the immunity conferred by 47 U.S.C. § 230(c)(1). They also argued that the safe harbor provisions of 17 U.S.C. § 512 entitled them to summary judgment on Perfect 10's copyright infringement and other copyright-based claims.

In response, Perfect 10 argued that the CDA immunity did not apply to its state law claims because, *inter alia*, they were supposedly "intellectual property" claims and thus within an exception to this immunity. Perfect 10 asserted various factual challenges to the application of the DMCA's safe harbors against its copyright claims.

On the CDA arguments, the district court granted summary judgment against Perfect 10's unfair competition and false advertising claims, which the court found were not "intellectual property" claims. The court denied summary judgment on Perfect 10's right of publicity and state trademark claims. The district court reasoned that rights of publicity are "a form of intellectual property." It further reasoned that the intellectual property exception extended to Perfect 10's state trademark claim because state trademark law offers relief similar to federal trademark law. (App. 92a-103a.)

On the DMCA arguments, the district court agreed with CCBill and CWIE that they were entitled to the DMCA's safe harbor protections. (App. 76a-88a.)

The Ninth Circuit affirmed in part and reversed in part. Interpreting for the first time the CDA's exception to immunity for claims arising under a "law pertaining to intellectual property," the court of appeals observed that many types of claims

> may—or may not—be characterized as "intellectual property" claims. While the scope of federal intellectual property law is relatively well-established, state laws protecting "intellectual property," however defined, are by no means uniform. Such laws may bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Because material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes.

(App. 26a-27a.) Accordingly, the court of appeals held that the term "intellectual property" referred only to federal intellectual property and held that CCBill and CWIE were eligible for CDA immunity from all of Perfect 10's state law claims. (App. 27a-28a.)

The court of appeals affirmed in part the partial summary judgment on CCBill and CWIE's DMCA defenses and remanded certain questions for further determination. The court of appeals agreed with the district court that Perfect 10 had not given CCBill or CWIE any DMCA-compliant notices regarding any subscriber's alleged copyright infringement. However, the court of appeals held that the district court erred in not considering CCBill's and CWIE's handling of DMCA-compliant notices from non-parties in ruling that they had reasonably implemented repeat infringer policies. The Ninth Circuit also remanded the action for further findings on whether CCBill or CWIE interfered with standard technical measures, on the nature of CCBill's payments to its clients, and on the facts concerning operation of hornybees.com. (App. 15a, 18a, 19a, 21a, 31a.)

The case is currently before the district court for further proceedings to determine the factual issues remanded by the court of appeals. In addition, the parties will litigate all facts not within the first phase of the litigation, namely, those beyond the DMCA and CDA defenses.

REASONS FOR DENYING THE PETITION

In the opinion below, the Ninth Circuit court of appeals analyzed, for the first time in any federal appellate court, the intellectual property exception to the immunity created by 47 U.S.C. § 230(c)(1). The court of appeals ruled that 47 U.S.C. § 230(e)(2), which provides that this immunity shall not be "construed to limit or expand any law pertaining to intellectual

property," should be read as referring to *federal* intellectual property. This opinion is consistent with the findings and intentions of Congress to promote the development of Internet computer services with a clear nationwide immunity. *See* 47 U.S.C. § 230(a) and (b). Were the rule otherwise, Internet computer service providers would be faced with uncertainty across all fifty states as to which state claims for relief are, involve, or are akin to "intellectual property."

The decision was unanimous. Judges Milan Smith, Stephen Reinhardt, and Alex Kozinski all agreed on the scope of the intellectual property exception. There was no dissenting or concurring opinion.

Perfect 10 attempts to manufacture a conflict between the opinion below and the First Circuit's opinion in *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007). However, the First Circuit did not actually analyze the scope of Section 230's intellectual property law exception when it affirmed a district court's dismissal of a state trademark dilution claim on First Amendment grounds. When Perfect 10 called *Universal Communication* to the Ninth Circuit's attention for rehearing *en banc*, the Ninth Circuit found that *Universal Communication* presented no conflict with its decision in this case. (Petition Appendix ["App."] 27a.) The Ninth Circuit's opinion thus presents no "conflict with the decision of another United States court of appeals on the same important matter" to merit review by this Court. Sup. Ct. R. 10(a).

Nor has Perfect 10 demonstrated that the court of appeals "has decided an important question of federal

law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). The law concerning the scope of the "intellectual property" exception to Section 230(c)(1) immunity is undeveloped. No court of appeals has decided the scope of the intellectual property exception in a manner inconsistent with the decision below. The issue should be allowed to percolate unless and until a significant circuit split develops.

Moreover, because this case is not over, this Court can consider review after there is a final judgment if a significant split in the circuit courts has then developed.

Finally, the decision of the court below to interpret the intellectual property exception in a manner consistent with a broad and uniform federal immunity for interactive Internet computer operations is correct and not one deserving of the scarce attention of this Court.

This Court has not ruled on the scope of 47 U.S.C. § 230, and thus there is no conflict between the opinion below and any decision of this Court.

Amicus Curiae Screen Actors Guild, Inc. ("SAG") and CMG Worldwide, Inc. ("CMG") add nothing of substance to Perfect 10's deficient Petition. Neither claims any conflict between the Ninth Circuit's decision and the decision of any circuit court or of this Court. Neither has identified an important question of federal law that must be settled by this Court. SAG and CMG merely complain that the Ninth Circuit's decision supposedly could impede their members' and clients' abilities to pursue state law right of publicity remedies

against interactive computer service providers. However, Congress has already weighed these interests against the risk of stifling development of the Internet economy posed by attempts to pin liability on interactive computer service providers for the actions of third parties. Congress came down squarely in favor of a robust immunity in favor of such service providers. The arguments of SAG and CMG may be made in favor of a new bill in Congress, but they provide no reason for a review of the decision below under a writ of certiorari.

ARGUMENT

In Section I below, Respondents demonstrate that the Ninth Circuit's opinion presents no "conflict with the decision of another United States court of appeals on the same important matter" to merit review by this Court. Sup. Ct. R. 10(a).

In Section II below, Respondents demonstrate that Perfect 10 has failed to show that the court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court," or that the decision "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

I. THE NINTH CIRCUIT'S DECISION PRESENTS NO CONFLICT WITH ANY DECISION OF ANY COURT OF APPEALS.

The thrust of Perfect 10's petition is that the decision of the Ninth Circuit supposedly conflicts with a decision of the First Circuit. Perfect 10 is wrong.

The First Circuit's opinion in *Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) does not pose an actual conflict with the Ninth Circuit's opinion. In *Universal Communication*, the First Circuit did not analyze the meaning of "law pertaining to intellectual property," but simply assumed that the state trademark dilution claim at issue came within this exception. *Id.* at 422-23 & n.7. Such an unconsidered assumption, without analysis, does not create a conflict worthy of review.

Moreover, the First Circuit's assumption that Section 230 did not apply was unnecessary to its resolution of the case. Although the plaintiff had styled the claim in question as one under Florida trademark law, the court found that the claim in fact arose from criticism of the plaintiff on a website, and affirmed dismissal of the claim on First Amendment grounds. *Id.* at 423-24. In light of the claim's failure on independent First Amendment grounds, the First Circuit's view as to the inapplicability of Section 230 is dictum and does not raise a material conflict with the Ninth Circuit decision.

Notably, the Ninth Circuit rejected the contention that it created a circuit split when it issued the opinion

in this case. (App. 27a-28a n.5.) After the Ninth Circuit rendered its initial opinion in this case, Perfect 10 requested rehearing *en banc* on the ground that the original opinion conflicted with *Universal Communication*. Perfect 10's request prompted the Ninth Circuit to amend its original opinion to note that *Universal Communication* had not decided, but had merely assumed, that the state law claim there fell within the intellectual property exception. (*Id.*) But while the First Circuit "was able to sidestep the question of what counted as intellectual property," the Ninth Circuit concluded that it could not avoid the question. (*Id.*) The Ninth Circuit thus became the first court of appeals to offer a reasoned interpretation of Section 230's exception for laws "pertaining to intellectual property."

Although Perfect 10 petitioned for rehearing *en banc*, making the same arguments it makes here, no judge deemed Perfect 10's challenges to the opinion sufficiently important to warrant even a single vote for rehearing *en banc*. *See Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108 (9th Cir. 2007). The Ninth Circuit's criteria for granting a rehearing *en banc* parallel Supreme Court Rule 10. *See* 9th Cir. R. 351 ("When the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such conflict is an appropriate ground for suggesting a rehearing en banc").

The two district court decisions cited by Perfect 10—*Gucci America, Inc. v. Hall & Associates*, 135 F. Supp. 2d 409 (S.D.N.Y. 2001) and *Voicenet Communications*,

Inc. v. Corbett, 2006 WL 2506318 (E.D. Pa. Aug. 30, 2006)—also do not create a legal conflict warranting this Court's review. As district court opinions, these decisions do not create a conflict falling within the grounds for Supreme Court review under Supreme Court Rule 10.

Moreover, neither of these district court cases analyzed whether the intellectual property exception should be read as referring to federal intellectual property claims. In *Gucci America, supra*, involving the sale of jewelry on the Internet bearing the "Gucci" mark, the plaintiff asserted federal trademark infringement and false designation of origin claims, as well as trademark infringement and unfair competition under New York common law. 135 F. Supp. 2d at 411. The district court ruled that Section 230(e)(2) barred the defendant's motion to apply the Section 230(c)(1) immunity to plaintiff's "claims," without disclosing whether the motion applied to all of the claims, without analyzing whether the state trademark and unfair competition claims were "intellectual property" claims, and without analyzing whether Section 230(e)(2) should be read as referring only to federal intellectual property claims. 135 F. Supp. 2d at 41217.

Voicenet Communications, supra, concerned whether Internet service providers could base a civil rights action (against law enforcement officials, for executing a search warrant) on the ISP's deprivation of rights under Section 230. *Voicenet* did not involve intellectual property claims or raise any question of the interpretation of Section 230(e)(2).

Neither SAG nor CMG has identified any conflict between the Ninth Circuit's decision and the decision of another circuit court. Each amicus simply complains that its members or clients are interested in vigorous enforcement of right of publicity laws on the Internet, but neither cites a circuit court decision supposedly conflicting with the decision in this case.

SAG cites authorities supporting its argument that state rights of publicity are a form of intellectual property,[1] but that was not the issue decided below by the Ninth Circuit. SAG has cited no conflict between the Ninth Circuit and any other circuit court concerning application of Section 230(c)(1) to rights of publicity. In fact, the Ninth Circuit has *consistently* applied Section 230(c)(1) to right of publicity claims, in the decision below and in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

CMG criticizes the Ninth Circuit for *following Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998), which decided that Section 230(c)(1) provides an immunity. Not only does *Zeran* have nothing to do with the scope of the Section 230(e)(2) intellectual property exception, but *every* circuit court of appeals considering the matter has

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[1] *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996), *Allison v. Vintage Sports Plaques*, 136 F.3d 1443 (11th Cir. 1998) and *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003).

followed *Zeran* in construing Section 230(c)(1) as providing an immunity.[2]

Since the Ninth Circuit's opinion presents no "conflict with the decision of another United States court of appeals on the same important matter," certiorari should be denied. Sup. Ct. R. 10(a).

II. THE DECISION BELOW DOES NOT INVOLVE AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT, NOR ANY CONFLICT WITH DECISIONS OF THIS COURT.

Perfect 10 has demonstrated no other circumstance compelling use of the Court's limited resources to review this case.

A. No Important Questions of Federal Law.

Perfect 10 has failed to show that the court of appeals "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

First, the law in this area is undeveloped. The opinion below is the first opinion to analyze the scope of the intellectual property exception to the immunity provided

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[2] *See Universal Communication Systems v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-23 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000).

by Congress in Section 230(c)(1). This area of law should be further developed by the federal courts in other circuits before this Court considers reviewing the issues.

Second, the decision of the court of appeals is interlocutory, and no final judgment has been entered in this case. The court of appeals remanded the action to the district court for resolution of further factual issues related to third party notifications, interference with standard technical measures, the nature of CCBill's payments, and control over one particular website (hornybees.com). (App. 15a, 18a, 19a, 21a, 31a.) Further, the parties have yet to litigate at the district court level the issues beyond phase one, namely, all issues and defenses other than application of the DMCA and CDA. Certiorari is properly denied, or deferred until final judgment in the lower courts, when the court of appeals has remanded a case to the district court. *See Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993).

Third, the lower courts in this case have never considered whether Perfect 10's causes of action would be viable but for Section 230's immunity. If Perfect 10's claims would fail on their own merits even without Section 230, then no construction of Section 230 in this case would "limit or expand any law pertaining to intellectual property." In the absence of any indication that Perfect 10 would prevail on the merits of its claims if Section 230 did not immunize CCBill and CWIE, Perfect 10's petition raises only an abstract question.

Fourth, Perfect 10's argument for construing the intellectual property limitation is strictly one of negation: Perfect 10 believes that the Ninth Circuit was wrong in

construing "intellectual property" to mean "federal intellectual property." Perfect 10 has offered no affirmative alternative construction of Section 230(e)(2) to substitute for the Ninth Circuit's definition. Perfect 10 just submits that its diverse state law claims for unfair competition, false advertising, misappropriation of rights of publicity, and unauthorized use of a mark should be allowed to go forward. Without a viable positive construction of "law pertaining to intellectual property," Perfect 10 would leave future courts and litigants without any guidance for determining the scope of Section 230's protection, exposing Internet service providers to the very uncertainty that Congress intended to eliminate by enacting Section 230.

Fifth, Perfect 10 has never previously argued to the district court or the circuit court of appeals that Congress's use of the word "Federal" in the criminal prosecution exception of Section 230(e)(1) implies the absence of a limitation to federal laws in Section 230(e)(2). (*See* Pet. 13-15.) Perfect 10 did not raise this argument until its unsuccessful attempt to obtain a rehearing after the Ninth Circuit had already rendered its decision below. The Court should permit the courts below or in other circuits to develop this point before considering whether the issue merits review.

Neither SAG nor CMG adds arguments justifying review of the Ninth Circuit's ruling. Each essentially says that its respective members and clients are interested in pursuing right of publicity claims in relation to activity on the Internet, and that the Ninth Circuit's ruling will impede their ability to pin liability on interactive computer service providers for content

created and posted by third parties. However, Congress already weighed these interests against the interests of interactive computer service providers, and concluded that subjecting interactive computer service providers to unwarranted civil liability for the activities of third parties would impede development of the Internet economy. Congress found the development of Internet technology and the concomitant economic benefits to be of vital importance. *See* 47 U.S.C. § 230(a) & (b). For example, Congress cited the "extraordinary advance[s]" in education and communication offered by the Internet, 47 U.S.C. § 230(a)(1), and articulated nationwide policies "to promote the continued development of the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(1) & (2). In light of these findings and policies, Congress came down squarely in favor of granting the immunity found in Section 230(c)(1).

The arguments of SAG and CMG would prevent uniform national application of the CDA immunity. Internet service providers are simultaneously conducting business in all fifty states. In the absence of uniform interpretation of Section 230(e)(2), interactive computer service providers would be exposed to different results in all fifty states concerning which state law claims could be considered "intellectual property" claims. In enacting the CDA, Congress was particularly concerned that state law might impose unwarranted liability on companies that served merely as intermediaries for other parties' potentially injurious

online material. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997) (discussing legislative purposes of Section 230).

SAG and CMG plead for sympathy for individuals whose remedies will be limited to recovery from the actual content providers, who may be judgment-proof. Such "sympathy is an insufficient basis for approving a recovery that Congress has not authorized." *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, Dept. of Labor*, 449 U.S. 268, 284 (1980). In interpreting a statute, members of the judiciary must put aside their "'appraisal of the wisdom or unwisdom of a particular course consciously selected by Congress,'" for "'[o]nce the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.'" *Id.* at 284 n. 27 (quoting *TVA v. Hill*, 437 U.S. 153, 194 (1978)). While Amici's pleas for sympathy may be raised in support of a bill before Congress to revise the scope of the Section 230(c)(1) immunity, these claims provide no basis for a review of the decision below.

B. No Conflict with Decisions of this Court.

Perfect 10 has failed to show that the Ninth Circuit court of appeal "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

Perfect 10's claim that the Ninth Circuit's decision conflicts with decisions of this Court is wrong. (Pet. 8, 13-15.) This Court has ruled on the scope of neither the Section 230(c)(1) immunity nor its intellectual property

exception. Perfect 10 is simply urging that one principle of statutory construction enunciated by this Court supposedly aids Perfect 10's reading of Section 230(e)(2). This is hardly the sort of "conflict" with a decision of this Court justifying review on a writ of certiorari. Further, the decision of the court of appeals is consistent with other well-established principles of statutory construction, such as giving effect to the stated findings and goals of Congress in enacting Section 230. Congress made plain its intent to support the development of Internet computer services through a robust and clear nationwide immunity against secondary liability claims involving third-party information content.

Neither SAG nor CMG identifies any decision of this Court that supposedly conflicts with the Ninth Circuit's decision. SAG discusses *Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562 (1977), which referred to the right of publicity as a "propriety interest," enforcement of which would serve goals "closely analogous to the goals of patent and copyright law." 433 U.S. at 573. However, the Ninth Circuit did not cite or disagree with *Zacchini*, nor did it determine whether the right of publicity is "intellectual property." The Ninth Circuit merely interpreted Section 230(e)(2) in a fashion resulting in uniform nationwide application of the immunity expressed in Section 230(c)(1).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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